



The criminal prosecution of illegal fishing and the jurisdiction of Spanish courts

Jose Manuel Sánchez Patrón

Departamento de Derecho internacional "Adolfo Miaja de la Muela", Facultad de Derecho, Universidad de Valencia, Avda. de los naranjos s/n, 46022 Valencia, Spain

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ABSTRACT

This paper examines the possibilities of criminally prosecuting illegal fishing in maritime zones based on crimes established in Spanish legislation. In order to carry out this analysis, a distinction has been made between prosecution based on the place in which acts of illegal fishing are committed (*ratione loci*), who is responsible for this illicit activity (*ratione personae*), and the criminal relevance of the incriminating conduct (*ratione materiae*). This reveals the scope of the criminal prosecution which Spanish courts can carry out and whether this is sufficient to guarantee marine biodiversity to the benefit of the international community.

1. Introduction

The first Spanish Criminal Codes considered fishing to be a crime when it was carried out on the property of others without the authorisation of the owners. Any violation of the law which regulated this activity was only punished circumstantially. Thus, trespassing on private property without the consent of the owner in order to fish was deserving of a greater criminal sanction than the illicit practice of this activity itself. The protected legal asset was more the property than the fisheries resources themselves.

This situation changed with the Criminal Code of 23 November 1995 [1], which is currently in force, but was amended in 2015 [2]. This legal text criminalises the fishing of "protected species" and those "in danger of extinction" (Art. 334) and other species when fisheries legislation is violated (Art. 335). Initially, the fishing of unprotected species was punished when it was not authorised by administrative legislation. However, the Spanish Constitutional Court declared that this "lack of authorisation" was too open and indefinite to be the object of a criminal sanction. For this reason, the previous wording was modified and the new text of Article 335 required that the fishing of these "other species" take place when it was expressly prohibited by the specific rules that regulate this activity.¹

Furthermore, fishing and shellfishing of unprotected species is punished when it is carried out in areas subject to special hunting laws or to a shellfishing or aquaculture concession or authorisation without the correct administrative licence (Art. 335.2) [3], and also when the fishing activity causes severe damage to the sustainability of the resources in

areas subject to concession or authorisation (Art. 335.3).

Last of all, the Spanish Criminal Code punishes the use of destructive or non-selective fishing techniques and equipment when the individual responsible for the catch is not authorised to employ them (e. g., poison), particularly if, with these techniques and equipment, significant damage is caused (Art. 336).

According to this regulation, the fishing of certain species prohibited in the administrative laws [4], as well as the way and means of carrying out the fishing activity, are defined as crimes in Spanish law. Likewise, it also incriminates the fishing of other species, permitted in the legislation, when it is carried out in certain areas without authorisation. Therefore, the legal interest protected by Spanish criminal law is no longer exclusively the fishery (to be more precise, marine biodiversity), safeguarding in addition legal assets that are related with property (public or private).

Thus, the Criminal Code punishes the fishing of certain species when this is carried out in a certain way or in specific places, with prison sentences or fines, as well as with the temporary disqualification of those responsible for these criminal activities. In addition to these penalties, administrative or civil sanctions may be imposed as a result of non-compliance with fishing legislation [5].

Based on the criminalisation of illegal fishing in Spanish law, the objective of this paper is to analyse the jurisdiction of Spanish courts to prosecute such crimes when they are committed in any maritime zone, on board fishing vessels bearing a Spanish flag or by Spanish nationals.

E-mail address: jmsp@uv.es.

¹ Judgement of the Spanish Constitutional Court 101/2012, 8 May 2012 (ECLI:ES:TC:2012:101).

2. The criminal prosecution of illegal fishing “ratione loci”

Organic Law 6/1985, of 1 July, of the Judiciary [6], determines the scope of the criminal jurisdiction of Spanish courts. According to this Law, the courts have jurisdiction over crimes committed in Spanish territory (Art. 23.1). However, difficulties arise when the principle of territoriality is applied to the maritime context. Therefore, it is necessary to define the scope of Spanish criminal jurisdiction in relation to crimes committed in the exercise of fishing activity in different marine zones in order to determine when such crimes could be prosecuted.

2.1. In territorial waters

Law 93/1962, of 24 December, prohibited foreign vessels from fishing in Spanish territorial waters and sanctioned infractions of fisheries legislation committed by these vessels.² The law punishes fisheries infractions with the detention and seizure of the vessel and the accessories carried on board for fishing, the confiscation and sale of the catch and the imposition of fines on the owners and captains of the vessels. This law was abrogated by Law 53/1982, of 13 July, on marine fishing infractions committed by foreign vessels in waters under Spanish jurisdiction and Spanish vessels, whatever their sphere of commission and their sanctions [7]. This law expressly stipulates that any breach of fisheries legislation in waters under Spanish jurisdiction constitutes an administrative infraction (Art. 1). This classification was extended to other Spanish laws in force at that time in relation to maritime fishing.³

Law 53/1982, of 13 July, was considered inadequate, among other reasons, due to the coming into force of Council Regulation (EEC) n° 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy [8]. This Regulation obliged member States to impose administrative or criminal sanctions, in the application of their national laws, against natural or legal persons responsible for the violation of rules relating to the Common Fisheries Policy (Art. 31). Crimes related to fisheries activity were included in the Criminal Code of 1995, which imposes penal sanctions for illegal fishing. Law 14/1998, of 1 June, by which the control regime for the protection of fisheries resources was established,⁴ regulated the administrative procedure applicable to fisheries infractions. However, this law did not exclude the possibility of imposing criminal sanctions when these constituted a crime. Thus, in cases in which illegal fishing can be classified as a crime, the authorities will refer the issue to the Public Prosecutor’s Office and the administrative proceedings in progress will be suspended (Art. 3.4). This same provision is also found in Law 3/2001, of 26 March on maritime fishing of the State [9]. The text of the wording is identical⁵; however, if the fishing vessel has been used to commit another type of crime, such as the trafficking of drugs or immigrants, those responsible for these crimes will be disqualified from fishing for a period of ten years (Art. 101.4). With these legislative developments, Spain applies European regulations on fishing. In this sense, Regulations (EC) 1005/2008, of 29 September, and 1224/2009, of 20 November, specify that “(m)

² Ley 93/1962, de 24 de diciembre, sobre sanciones a las infracciones que en materia de pesca cometan las embarcaciones extranjeras en aguas territoriales o jurisdiccionales españolas. [Law 93/1962 of 24 December 1962 on sanctions to infractions of fisheries legislation committed by foreign vessels from fishing in Spanish territorial waters] BOE No. 310, 27 December 1962.

³ Under Spanish legislation, public administration organs can apply punitive measures (fines, seizures, etc.). However, criminal sanctions (prison, fines, etc.) can only be adopted by judicial bodies. Sometimes, the first kinds of measures are more effective than the last in practice.

⁴ BOE No. 131, 2 June 1998.

⁵ Art. 91. La Ley 33/2014, de 26 de diciembre, por el que modifica la Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado lo renumera por art. 92 [Law 33/2014 of 26 December 2014 which modifies Law 3/2001 of 26 March 2001 on Maritime Fishing of the State and renumber by article 92] BOE No. 313, 27 December 2014.

ember States may also, or alternatively, use dissuasive criminal sanctions” in the event of serious infringements.⁶

Thus, the majority of the fishing infractions committed in Spanish territorial waters have lost their criminal character and have become administrative infractions. However, the Criminal Code of 1995 criminalises illegal fishing. This implies that Spanish Courts have jurisdiction to prosecute this crime in the application of the principle of territoriality when it is committed by Spanish nationals or by foreigners in waters subject to State sovereignty.

2.2. In the exclusive economic zone

Before the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) [10] came into force, Law 15/1978, of 20 February, on the economic zone⁷ established that Spain “shall have sovereign rights for the purposes of exploring and exploiting the natural resources of the seabed, subsoil thereof and its superjacent waters ... from the outer limit of the Spanish territorial sea for a distance of 200 nautical miles from the base lines” (Art. 1.1). “Fishing in the economic zone shall be reserved for Spanish nationals”. This meant that “(f)oreign fishermen ... may not fish in the economic zone” (Art. 3). However, foreigners “whose fishing vessels have habitually fished in the zone” could continue to do so “subject to agreements between the Governments concerned” (Art. 3.1), as was the case in the territorial sea. Furthermore, foreign fishermen could fish in the economic zone if this was established “in international treaties to which Spain is a party” (Art. 3.2).

Law 15/1978 extended the application of Law 93/1962, of 24 December, to the sanctioning of fisheries infractions committed by foreign vessels in this marine zone equating them to those committed in territorial waters. However, it should be remembered that UNCLOS limits the jurisdiction of coastal States when imposing sanctions. It authorises the beginning of legal proceedings for infractions, including those of a criminal nature,⁸ although it limits penalties which can be imposed for violations of fisheries regulations, as they “may not include imprisonment” [11], unless this has been agreed between the States, or any other form of “corporal punishment”.⁹

As mentioned above, Law 93/1962 was substituted by Law 53/1982, of 13 July. Under this law, violations of fisheries legislation and regulations in the exclusive economic zone were equated to those committed in the territorial sea and, consequently, were considered to be administrative infractions. This characterisation of the fisheries infringements was confirmed by the subsequent legislation (Law 14/1998, of 1 June and Law 3/2001, of 26 March). However, European Union fisheries laws gave States the power to criminalise certain more serious fisheries infractions [12], as Spain did in the Criminal Code of 1995, which can also be applied to illegal fishing committed in the exclusive economic zone.

3. The criminal prosecution of illegal fishing “ratione personae”

Organic Law 6/1985, of 1 July of the Judiciary also attributes jurisdiction to Spanish courts to prosecute illegal fishing according to the criterion of nationality, regardless of the maritime zone in which the crime is committed. Below, the scope of the jurisdiction of the Spanish courts to prosecute illegal fishing based on this criterion will be analysed.

3.1. Illegal fishing on board Spanish vessels

According to Royal Decree 681/1980, of 28 March on the

⁶ Art. 44.3 and 90.5, respectively.

⁷ BOE No. 46, 23 February 1978.

⁸ Art. 73.1.

⁹ Art. 73.3.

management of national fisheries activity [13], fishing vessels bearing the Spanish flag are subject to the control of the Spanish authorities in the exercise of their fishing activity. In the context of this enforcement jurisdiction, the fishing administration will regulate the exercise of this activity in waters under Spanish jurisdiction and the conditions for obtaining a temporary fishing licence in order to carry out this activity in waters subject to foreign jurisdiction or on the high seas (Art. 4). The violation of the conditions for fishing and the undue use of fishing licences shall bring about the suspension of fisheries activity and the imposition of other administrative sanctions in accordance with legislation.

At the present time, Law 3/2001, of 26 March, on maritime fishing of the State regulates the fisheries activities of vessels flying Spanish flags, establishing “the regime of infractions and sanctions concerning maritime fishing in foreign waters”.¹⁰ The latter aspect was modified by Law 33/2014, of 26 December. According to this Law, infractions committed on board vessels flying the Spanish flag could be prosecuted independently of whether they took place inside or outside waters under Spanish sovereignty or jurisdiction. Spanish fisheries authorities also have jurisdiction over infractions committed on board stateless vessels (when these are committed by natural or legal persons of Spanish nationality) or on vessels with foreign flags if the flag State does not exercise its sanctioning powers. Finally, the jurisdiction of the fisheries authorities extends to illegal, unreported, and unregulated (IUU) fishing detected in Spanish territory or in maritime zones subject to Spanish sovereignty or jurisdiction, even though they may have been committed outside of these waters, independently of the vessel’s flag State or the nationality of the suspects (Art. 90).

The sanctions included in this law are of an administrative nature. This does not exclude the possible imposition of other types of sanctions, such as those of a criminal nature (Art. 92.1). Thus, as previously mentioned, illegal fishing is criminalised in the Criminal Code and can be prosecuted by the courts when it is committed on board a vessel bearing the Spanish flag, independently of the maritime area in which the vessel is found. Organic Law 6/1985, of 1 July attributes jurisdiction to Spanish courts for “crimes (...) perpetrated (...) on board Spanish vessels (...) notwithstanding the stipulations of international treaties to which Spain is a signatory” (Art. 23.1).

When the fisheries infraction can be considered to be a crime, preference is given to criminal prosecution over administrative procedure. According to Law 3/2001, the fisheries authorities shall refer the disciplinary proceedings to the criminal courts and interrupt the administrative procedure until the court declares a verdict or the Public Prosecutor’s Office returns the proceedings to the fisheries authorities (Art. 92). If criminal responsibility is confirmed in the criminal procedure, those convicted “shall be disqualified from exercising or carrying out fisheries activities for a period of ten years” (Art. 105).

3.2. *Illegal fishing carried out by Spanish nationals*

The Law on maritime fishing of the State also employs the criterion of nationality in punishing fisheries infractions, particularly those within the notion of IUU fishing (Art. 40 bis). Thus, the fisheries administration has jurisdiction in order to prosecute and sanction persons of Spanish nationality who take part in the commission of offences, be it directly or via other persons [14]. This jurisdiction is exercised independently of the maritime zone in which the natural or legal persons may have committed the infraction and is extended to infractions committed on board vessels flying a Spanish flag, stateless vessels or those without nationality and even on board vessels flying foreign flags except when the flag State has exercised its power to impose sanctions (Art. 90).

In relation to the latter possibility, the Spanish Government had adopted Royal Decree 1134/2002, of 31 October, on the application of

sanctions in the area of maritime fishing to Spanish nationals registered in vessels flying flags of convenience [15]. This regulation was a response to the problem of IUU fishing committed by vessels flying flags of convenience which normally correspond to States which do not cooperate in the conservation of marine living resources. Stateless vessels or those without nationality, according to this Royal Decree, shall be considered to be vessels flying flags of convenience. In any of the afore-mentioned cases, Spanish nationals who have connections to these vessels and violate fishing laws could be sanctioned in Spain.

The same approach is adopted by Royal Decree 747/2008, of 9 May, which established the regulation of the sanctioning regime in the area of maritime fishing in foreign waters [16], and which was substituted by Royal Decree 182/2015, of 13 March approving the new Regulation [17]. This Royal Decree regulates the sanctioning procedure in the case of infractions committed by Spanish nationals on board vessels flying flags of convenience.¹¹ Captains of these vessels could be sanctioned regardless of the fact that this responsibility can also be demanded of “natural or juridical persons who are the owners of the vessels” (Art. 6.3). Although the sanction established in these cases is “administrative”, this does not exclude criminal sanctions (Art. 6.1), as has been highlighted by Spanish Courts [18].

Having said this, do Spanish courts have jurisdiction over fisheries infractions committed by Spanish nationals which could be considered to be crimes? Spanish Law confirms the jurisdiction of the country’s courts over crimes related to illegal fishing committed by Spanish nationals in any maritime zone, even when they are subject to the jurisdiction of another State [19]. According to Organic Law 6/1985, of 1 July, of the Judiciary, Spanish courts have jurisdiction over “crimes committed outside Spanish territory” if they have been committed by Spanish nationals or foreigners who have acquired Spanish nationality after committing the crime (Art. 23.2). Thus, jurisdiction is attributed to Spanish courts in the application of the principle of active personality.

In these cases, the Spanish nationality of those responsible for the crime is the criterion on which the jurisdiction of the Spanish courts is based. However, the application of the principle of active personality is subject to three conditions. First of all, that “(t)he offender must not have been acquitted, pardoned or convicted abroad or, in the latter case, must not have served the sentence. If only part of the sentence has been served, this shall be borne in mind in order to decrease the corresponding sentence by the appropriate amount”.¹² Secondly, that the offence should be punishable in the place where it has been committed, unless an international treaty or an act of an international organisation establishes the contrary, that is, the criterion of double criminality.¹³ And, thirdly, a final condition of a procedural nature, consisting of the fact that “(t)he affected party or the State Prosecutor must file a lawsuit before the Spanish courts”, bearing in mind that, according to a recent modification introduced into this Organic Law 6/1985, the charge can also be presented by the newly-formed European Public Prosecutor’s Office with regard to financial crimes which are part of this body’s competence [20].

4. The criminal prosecution of illegal fishing “*ratione materiae*”

According to Organic Law 6/1985, of 1 July, of the Judiciary, Spanish courts can exercise their criminal jurisdiction extraterritorially to prosecute specific crimes without taking into consideration the nationality of those responsible. Unlike the place in which the crime may have been committed (territoriality) or who may have committed it (nationality), the exercise of jurisdiction is based on Spain’s interest in the protection of certain legal interests affected by an offence committed abroad. In this regard, a difference should be established between legal

¹¹ Arts. 34–36.

¹² Art. 23.2c)

¹³ Art. 23.2 a)

¹⁰ Art. 1 e).

interests which directly affect the interests of Spain (protective principle) and those which do so indirectly (principle of universal jurisdiction) as part of the international community.

4.1. The protective principle

Crimes which can be prosecuted under the protective principle appear in the first Criminal Codes due to the fact that they were originally conceived in order to punish conducts which threatened State institutions. At the same time, their prosecution was conceived in a broad way as they concerned vital State interests (for example, its security or integrity). Therefore, it was not necessary to fulfil particular procedural conditions. The current wording of Organic Law 6/1985, of 1 July, of the Judiciary only requires the presentation of a case by the injured party or the Public Prosecutor's Office. According to Article 23.3, "(a)cts committed by Spanish nationals or foreign nationals outside national territory shall fall under Spanish jurisdiction where they are liable to be classified, under Spanish Criminal Law, as any of the following crimes", among which can be found "(t)reason, (...) rebellion (...) sedition (...) (a)ttacks against the Spanish authorities or public servants (...) (or) crimes against the Spanish Public Administration (...)" among others (Art. 23.3).

However, in this closed list of crimes, no mention is made of crimes relating to illegal fishing. Therefore, the extraterritorial prosecution of such offences would not be possible under this principle. The Spanish Supreme Court confirmed this in the *Vidal Armadores* case when admitting that "crimes against the environment via illegal fishing (...) do not affect, in the opinion of the legislator, a legal interest of singular value for the national community, to the point that it is justified to break the barriers imposed by the principle of territoriality" [21].

4.2. The principle of universal jurisdiction

Unlike the crimes included in the protective principle, those which can be judged by Spanish courts on the basis of the principle of universal jurisdiction are characterised by the fact that they affect the international community of States as a whole and can be prosecuted by all of its members. For this reason, the Spanish legislator has included them in a specific list, different from that mentioned above. This list of crimes and the conditions for prosecuting them have varied several times since Organic Law 6/1985, of 1 July was passed. Organic Law 1/2014, of 13 March, modifying Organic Law 6/1985, included in its extended list "crimes against the security of maritime navigation which are committed in marine spaces, in the cases provided for in the treaties ratified by Spain or in legislative acts of an International Organisation of which Spain forms part",¹⁴ but did not extend the list to other maritime crimes such as illegal fishing [22]. However, its inclusion remains open due to the possibility of Spanish courts having jurisdiction over "(a)ny other crime entailing mandatory prosecution under a Treaty that is in force in Spain, or other regulatory acts of an international organisation of which Spain is a member, in the cases and under the conditions therein stipulated".¹⁵ In the light of this clause, it is necessary to consider whether there are any international treaties or acts of international organisations which "oblige" Spain to prosecute illegal fishing universally. However, the requirement that criminal prosecution should be "mandatory" for Spanish courts impedes its use in practice [23]. The relevant international instruments in the field of fishing do not contain any article that requires criminal prosecution with an "imperative" character, as provided for in Spanish law.

Irrespective of these restrictive requirements, some authors see the possibility of the universal prosecution of illegal fishing practices in certain international treaties and, even, in acts of international

organisations. Indeed, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 4 August 1995 [24], states that: "(a) port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures, a port State shall not discriminate in form or in fact against the vessels of any State".¹⁶ Although it is not expressly stated, it can be deduced from this provision that the port State is able to sanction violations of international rules relating to high seas fishing and to prosecute those responsible whatever nationality they may possess, thus conferring a universal character upon this rule [25].

Likewise, the General Assembly of the United Nations passed Resolution 46/215 [26], in which all the members of the international community were exhorted to guarantee that "a global moratorium on all large-scale pelagic drift-net fishing is fully implemented on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas".¹⁷ To this aim, the Assembly requested that appropriate sanctions be imposed for acts carried out contrary to the cited resolution [27].

Independently of the scope given to these precedents, it does not seem unreasonable for States to extend the protection under criminal law of marine biological diversity beyond their territories and citizens or vessels, opening up the possibility for their courts to have jurisdiction over certain crimes regardless of who commits them and where they are committed. This could be considered as a way of protecting certain fisheries resources in the interests of humanity.

However, although all of the above may become reality, it should not be forgotten that each of the crimes included within the principle of universal jurisdiction is submitted to restrictive conditions. To these are added other general restrictions: these crimes must not be prosecuted by another state or international court,¹⁸ and the injured party or the Public Prosecutor must file the corresponding lawsuit.¹⁹

5. Conclusions

This paper shows the importance attributed in Spanish law, along with European and international, to the conservation of fishery resources, since it constitutes a legal interest that must be protected. At the same time, the means of protecting these fisheries resources is being decriminalised (removing it from the most vigorous legal protection) and becoming subject to administrative sanctions. Only when such exploitation (be it foreign or national) affects the sustainability of fisheries resources is criminal law applied and, therefore, abuses thereof are punished.

Furthermore, Spanish law stipulates that crimes committed against fisheries resources can be prosecuted on the basis of the traditional principles of territoriality and personality. The latter allows Spanish courts to extraterritorially prosecute such crimes in the high seas. However, this possibility does not guarantee their effective prosecution due to the limits imposed by the use of so-called flags of convenience, along with the probable lack of collaboration of other States, either out of a lack of interest or apathy.

In order to resolve the afore-mentioned problems, Spain could include illegal fishing in the list of crimes which can be criminally prosecuted, be it committed in waters under Spanish sovereignty or jurisdiction or carried out by Spanish nationals.

Although the inclusion of such criminal offences in the list of those

¹⁴ Art. 23.4 d).

¹⁵ Art. 23.4.p).

¹⁶ Art. 23.1.

¹⁷ Par. 3c).

¹⁸ Art. 23.5.

¹⁹ Art. 23.6.

which concern State interests may seem excessive, their insertion in lists of crimes which can be universally prosecuted should not be discounted. Certainly, the conception of this principle in Spanish law is extremely restrictive, although it should also be noted that the conservation and sustainable use of oceans, seas and marine resources is today considered a priority objective of the international community, as reflected in SDG 14 of the 2030 Agenda. Consequently, its criminal protection is not only justified, but should be an obligation for all States. Consequently, its criminal prosecution is not only justified, but should be an obligation for all States based on some criminal jurisdictional principle.

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Declarations of interest

none.

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